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No. 09-1125

Supreme Court, U.S.
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In The
Supreme Court of the United States

GLENN ALLEN ADAIR d/b/a SUPER D 229, *et al.*,

Petitioners,

vs.

AMERUS LEASING, INC., *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION OF LEASE PARTNERS, INC. AND FIRST BANK RICHMOND, N.A.

ROY H. LIDDELL (MSB #1252)
TREY C. DELLINGER (MSB #10348)
Counsel of Record
WELLS MARBLE & HURST, PLLC
300 Concourse Blvd., Suite 200
Ridgeland, Mississippi 39157
Post Office Box 131
Jackson, Mississippi 39205-0131
Telephone (601) 605-6900
tdellinger@wellsmar.com

Attorneys for Respondents Lease Partners, Inc. and First Bank Richmond, N.A.

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OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

The suit at bar was removed by the FDIC to the United States District Court, with jurisdiction based on 12 U.S.C. §1819(b)(2), which provides that "all suits of a civil nature" to which the FDIC "is a party" shall be "deemed to arise under the laws of the United States." After removal, the FDIC and Plaintiffs claiming against it were dismissed. The District Court then exercised a claimed discretion to remand the action to the state court. On appeal, the Fifth Circuit held that 12 U.S.C. §1819(b)(2) provided the District Court with original subject matter jurisdiction upon intervention and removal by the FDIC; that this jurisdiction was not altered by the post-removal dismissal of the FDIC; and that the District Court did not have discretion to remand a case over which it possessed original jurisdiction.

The question presented is this: Did the Fifth Circuit correctly decide that, upon intervention and removal by the FDIC, the District Court acquired original subject matter jurisdiction over the entire suit under 12 U.S.C. §1819(b)(2); that this original subject matter jurisdiction was determined at the time of filing and persisted after the post-removal dismissal of the FDIC; and, accordingly, that the District Court had no discretion to remand an action over which it possessed original subject matter jurisdiction?

CORPORATE DISCLOSURE STATEMENT

Respondent First Bank Richmond, N.A. is owned by Richmond Mutual BanCorp. Inc.

Anthem Financial, Inc. owns 100% of Respondent Lease Partners, Inc.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Art. III, Section 2, Clause 1 of the United States Constitution provides in pertinent part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . . – To Controversies to which the United States shall be a Party; . . .

Title 12, Chapter 16 of the United States Code, provides for original federal jurisdiction of cases in which the Federal Deposit Insurance Corporation (the "Corporation" or "FDIC") is a party, and provides in pertinent part at 12 U.S.C. §1819(a) (First, Fourth and Ninth):

> Upon June 16, 1933, the Corporation shall become a body corporate and as such shall have power – . . .
>
> . . . To sue and be sued, and complain and defend, by and through its own attorneys, in any court of law or equity, State or Federal [and] . . .
>
> . . . To act as a receiver[.]

The statute further provides in pertinent part at 12 U.S.C. §1819(b)(2)(A):

> (A) In general
>
> Except as provided in subparagraph (D), all suits of a civil nature at common law or in

> equity to which the Corporation, in any capacity, is a party shall be deemed to arise under the laws of the United States.

Concerning removal, 12 U.S.C. §1819(b)(2)(B) provides:

> (B) Removal
>
> Except as provided in subparagraph (D), the Corporation may, without bond or security, remove any action, suit or proceeding from a State court to the appropriate United States district court before the end of the 90-day period beginning on the date the action, suit, or proceeding is filed against the Corporation or the Corporation is substituted as a party.

Concerning certain State actions involving the FDIC for which original federal jurisdiction is not provided, 12 U.S.C. §1819(b)(2)(D) provides:

> (D) State actions
>
> Except as provided in subparagraph (E), any action–
>
> (i) to which the Corporation, in the Corporation's capacity as receiver of a State insured depository institution by the exclusive appointment by State authorities, is a party other than as a plaintiff;
>
> (ii) which involves only the preclosing rights against the State insured depository institution, or obligations owing to, depositors, creditors, or stockholders by the State insured depository institution; and

(iii) in which only the interpretation of the law of such State is necessary,

shall not be deemed to arise under the laws of the United States.

STATEMENT OF THE CASE

The plaintiffs in this case, a group of individual pharmacists, pharmacies, veterinarians and veterinary clinics ("Plaintiffs" or "Petitioners"), sued individual salesmen and different financial institutions in Mississippi state court, alleging state law fraud, negligence, breach of contract and usury claims. (Pet. App. at 2a.) The claims arise from the Plaintiffs' leasing of electronic advertising equipment for display in their various places of business. (*Id.*) During the state court litigation, the FDIC entered the case after being appointed receiver for NetBank, a successor bank to one of the original defendants, by the Office of Thrift Supervision. (Pet. App. at 2a; Resp. App. at 7a.) The FDIC removed the suit to the United States District Court, with jurisdiction based on 12 U.S.C. §1819(b)(2). (Pet. App. 2a.) After removal, Plaintiffs moved to dismiss the FDIC on the ground that federal law provided that the claims of NetBank depositors had priority over the claims of the Plaintiffs; thus, Plaintiffs had no possibility of recovery against the FDIC. (Resp. App. at 10a.) Plaintiffs also filed a motion to remand to state court. (Pet. App. at 2a.) The District Court granted Plaintiffs' motion to dismiss the FDIC and granted Plaintiffs' motion to

remand. (*Id.*) The District Court held that no original federal jurisdiction remained over Plaintiffs' remaining claims and that it retained only supplemental jurisdiction over those claims. (Pet. App. at 2a-3a.) The District Court's remand was based on its perception that it had discretion to decline to exercise jurisdiction over what it viewed as predominately state law claims. (Pet. App. at 3a.) The Defendants appealed the remand order to the Fifth Circuit Court of Appeals. (*Id.*)

The Fifth Circuit determined that the FDIC's initial involvement gave the District Court original subject matter jurisdiction over the entire action, including jurisdiction over those claims not involving the FDIC. (*Id.* at 6a) (citing *Buchner v. FDIC*, 981 F.2d 816, 819 (5th Cir. 1993)). The Fifth Circuit next examined the effect on that jurisdiction of the FDIC's dismissal. The Fifth Circuit held that subject matter jurisdiction is determined at the time of removal and is not ousted by post-removal events. (Pet. App. at 13a) (citing *Federal Sav. & Loan Ins. Corp. v. Griffin*, 935 F.2d 691, 696 (5th Cir. 1991), *cert. denied*, 502 U.S. 1092, 112 S.Ct. 1163, 117 L.Ed.2d 410 (1992).

Because the District Court continued to have original subject matter jurisdiction after dismissal of the FDIC, the Fifth Circuit determined that the District Court did not have discretion to remand an action over which it possessed original subject matter jurisdiction. (*Id.* at 14a) (citing *Buchner*, 981 F.2d at 821) (itself citing *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 345 (1976)).

The fact that neither the FDIC nor any successor entity remains in this case raises, at most, only a surface novelty. This Court need break no new ground to answer the question presented. Rather, this Court's settled precedents provide answer enough.

This Court held as long ago as 1942 that the FDIC's charter gives the federal district courts original subject matter jurisdiction over cases involving the FDIC.[1] This Court has held since at least 1824 that jurisdiction is determined at the time of filing and is not divested by subsequent events.[2] This Court held as early as 1976 that district courts do not have discretion to decline to exercise original jurisdiction.[3]

These settled precedents, when applied to the facts of this case, lead inexorably to the conclusion that intervention and removal by the FDIC gave the District Court original subject matter jurisdiction over this entire action; that that jurisdiction was not divested by the post-removal dismissal of the FDIC;

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[1] *American National Red Cross v. S.G. and A.E.*, 505 U.S. 247, 253 (1992) (characterizing this Court's holding in *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 455-56 (1942) as establishing that the FDIC's charter gives the federal courts original subject matter jurisdiction over cases involving the FDIC).

[2] *See Freeport McMoRan, Inc. v K N Energy, Inc.*, 498 U.S. 426, 428 (1991) (*per curiam*) ("We have consistently held that if jurisdiction exists at the time an action is commenced, such jurisdiction may not be divested by subsequent events.") (citing *Mollan v. Torrance*, 9 Wheat. 537, 6 L.Ed. 154 (1824))

[3] *Thermtron*, 423 U S. at 345.

and thus, that the District Court did not have discretion to remand the remaining claims, over which it continued to possess original jurisdiction.

The question presented is answered by the settled precedents of this Court. The petition for writ of certiorari presents no novel issues. It does not warrant this Court's attention, and should be denied.

REASONS FOR DENYING THE PETITION

I. 12 U.S.C. §1819 GIVES THE DISTRICT COURT ORIGINAL JURISDICTION OVER THE ENTIRE ACTION, INCLUDING JURISDICTION OVER CLAIMS NOT INVOLVING THE FDIC.

This Court held as long ago as 1942 that the FDIC's charter, now codified in 12 U.S.C. §1819, gives the federal district courts *original* subject matter jurisdiction over cases involving the FDIC. *American National Red Cross,* 505 U.S. at 253 (1992) (characterizing this Court's 1942 holding in *D'Oench, Duhme & Co.*, 315 U.S. at 455-56 as establishing that the FDIC's charter gives the federal courts original subject matter jurisdiction over cases involving the FDIC).

Moreover, the plain language of 12 U.S.C. §1819 makes clear that the initial involvement of the FDIC gave the District Court original subject matter jurisdiction over the entirety of this action. The statute provides that "all *suits* of a civil nature at common

law or in equity to which the Corporation, in any capacity, is a party *shall be deemed to arise under the laws of the United States*" and that the FDIC may remove "any *action, suit or proceeding*" to federal district court. 12 U.S.C. §1819(b)(2)(A)-(B) (emphasis supplied). The Fifth Circuit below found, consistent with this Court's holding in *American National Red Cross*, that the FDIC's involvement gave the district court original federal jurisdiction over *the entire suit*, not just over component claims involving the FDIC:

> Pursuant to §1819(b)(2)(A), all suits to which the FDIC is a party and all component claims in those suits are '*conclusively* presumed to arise under the laws of the United States, and thus . . . within original subject matter jurisdiction of the proper federal district court.' Because a suit and all its component claims are conclusively deemed to arise under federal law once the FDIC is a party, §1819(b)(2) provides jurisdiction over suits whose causes of action may otherwise largely depend on state law and which may not otherwise be subject to federal-question jurisdiction under the general federal-question statute of 28 U.S.C. §1331.

(Pet. App. at 6a) (quoting *Buchner*, 981 F.2d at 819 (emphasis supplied by *Adair* court) and citing *In re Meyerland Co.*, 960 F.2d 512, 514-15 (5th Cir. 1992) (*en banc*)); *see also Griffin*, 935 F.2d at 697.

Additionally, cases in the Third, Eighth and Ninth Circuits considering jurisdiction in cases involving the FDIC under 12 U.S.C. §1819(b)(2), or the RTC

under the nearly identical 12 U.S.C. §1441a(*l*)(1), have reached the same conclusion as the Fifth Circuit in *Buchner* and *Griffin*. Those cases conclude that, once the FDIC or RTC becomes a party, the district court has original subject matter jurisdiction over the entire case under 12 U.S.C. §1819(b)(2) (FDIC) or 12 U.S.C. §1441a(*l*)(1) (RTC). These cases hold that the district court possesses *original subject matter jurisdiction over the entire case*, including claims not involving the federal entity. In other words, the jurisdiction is *original jurisdiction* under section 1819(b)(2) (FDIC) and 1441a(*l*)(1) (RTC), *not merely supplemental jurisdiction* under 28 U.S.C. §1367. *See Kansas Public Employees Retirement System v. Reimer & Koger Assoc., Inc.* (*KPERS*), 77 F.3d 1063, 1067 (8th Cir. 1996) (because RTC was a party, court has arising-under jurisdiction under 12 U.S.C. §1441a(*l*)(1), rather than supplemental jurisdiction, even over the claims that do not involve the RTC); *Brockman v. Merabank*, 40 F.3d 1013, 1015-16 (9th Cir. 1994) (holding that the term "suit" in §1441a(*l*)(1) includes all claims in a case, and that the addition of RTC to the action "transformed the entire suit into one that arose under federal law.") (citation omitted); *Spring Garden Assoc. v. RTC*, 26 F.3d 412, 415-16 (3rd Cir. 1994) (same).

As the foregoing authorities demonstrate, the FDIC's initial involvement gave the District Court original subject matter jurisdiction over the entire action under 12 U.S.C. §1819, including jurisdiction of claims not involving the FDIC.

II. THE FIFTH CIRCUIT FOLLOWED THIS COURT'S SETTLED PRECEDENT THAT JURISDICTION IS DETERMINED AT THE TIME OF REMOVAL. THUS, THE FIFTH CIRCUIT CORRECTLY HELD THAT THE LATER DISMISSAL OF THE FDIC DID NOT DIVEST THE DISTRICT COURT'S ORIGINAL JURISDICTION OVER THIS CASE.

After determining the district court had original subject matter jurisdiction over the entire action upon intervention and removal by the FDIC, the Fifth Circuit below decided that the subsequent dismissal of the FDIC did not oust the court's original subject matter jurisdiction over the remaining claims. (Pet. App. at 12a-13a.) The Fifth Circuit's basis for this holding was the principle that jurisdiction is assessed at the time of filing (or at the time of removal), and is not ousted by subsequent events. (*Id.*) (citing *Griffin*, 935 F.2d at 696).

This principle, commonly referred to as the "time of filing rule," has been adhered to by this Court in cases both venerable and modern. *See Freeport McMoRan, Inc. v. K N Energy, Inc.*, 498 U.S. 426, 428 (1991) (*per curiam*) ("We have consistently held that if jurisdiction exists at the time an action is commenced, such jurisdiction may not be divested by subsequent events.") (citing this Court's 1824 decision in *Mollan*, 6 L.Ed. 154); *see also Clarke v. Mathewson*, 37 U.S. 164, 167 (1838) (same); *St. Paul Mercury Indemnity Co. v. Red Cab*, 303 U.S. 283, 289-90 (1938)

("Events occurring subsequent to the institution of suit which reduce the amount recoverable below the statutory limit do not oust jurisdiction.").

Moreover, application of the time of filing rule has not been limited to cases involving diversity jurisdiction. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 569 (1992) (upheld the time of filing rule in rejecting the idea that the standing of parties, who were added after litigation began, could create a sufficient case or controversy for Art. III jurisdiction even if the original plaintiffs lacked standing); *McLain v. Anderson*, 567 F.3d 956, 965 (8th Cir. 2009) (in an action removed to district court based on federal question jurisdiction under the Employee Retirement and Income Security Act, court held that jurisdiction depends upon facts existing at time of filing and may not be divested by subsequent events); *Seawright v. Greenberg*, 233 Fed. Appx. 145, 147-48 (3rd Cir. 2007) (federal question jurisdiction is assessed at time of removal, subsequent events do not divest federal question jurisdiction); *Libhart v. Santa Monica Dairy Co.*, 592 F.2d 1062, 1064 (9th Cir. 1979) (applying time-of-filing rationale to federal question case); *Harrison v. Provident Life & Accident Ins. Co.*, 26 F.3d 930, 932 (9th Cir. 1994) (same).

Indeed, the time of filing rule has been adhered to in other Circuits in cases involving the FDIC and the RTC. *KPERS*, 77 F.3d at 1067-68 (existence of jurisdiction under 12 U.S.C. §1441a(*l*)(1) determined at time of removal, subsequent dismissal of RTC did not impair jurisdiction); *Casey v. FDIC*, 583 F.3d 586,

591 (8th Cir. 2009) (following *KPERS* in holding that all claims in a case involving the FDIC arise under federal subject matter jurisdiction under 12 U.S.C. §1819(b)(2); thus, subsequent dismissal of the FDIC did not impair that jurisdiction); *FDIC v. Four Star Holding Co.*, 178 F.3d 97, 100 (2nd Cir. 1999) (existence of jurisdiction under 12 U.S.C. §1819(b)(2) determined at time of filing; thus, original federal subject matter jurisdiction remained despite transfer of assets by FDIC to private third party).

Petitioners argue that, by wording §1819(b)(2) to state that all suits to which the FDIC "is a party" arise under federal law, Congress intended for that statute to provide no jurisdiction after dismissal of the FDIC. (Pet. Brief at 10-12, 19-21.) Petitioners further argue that the Fifth Circuit's position has created a split between the circuits on this issue. (*Id.* at 19-21.) However, of the other Circuit cases cited by Petitioners as squarely disagreeing with the Fifth Circuit, only one contains any detailed analysis of these jurisdictional issues.[4]

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[4] The cases cited by Petitioners from other circuits shed little light on the question presented, as they contain little or no analysis of the pertinent issues; rather, they simply assert their jurisdictional conclusions axiomatically.

In *Myers v. Moore Engineering, Inc.*, 42 F.3d 452, 454 (8th Cir. 1994), the 8th Circuit upheld a district court's denial of a motion to remand under a case removed under 12 U.S.C. §1441(a), which contains language similar to that involved in 12 U.S.C. §1819(b)(2). The appellants in *Myers* argued that the district court abused its discretion in remanding the case, 42 F.3d

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at 454; however, there is no indication that the appellants in *Myers* argued that the district court did not *have* discretion, which was the argument advanced by the Appellants and accepted by the Fifth Circuit in this case. The *Myers* court provided no analysis supporting its assumption that the district court had discretion to remand.

Similarly, in *Bank of Oklahoma v. Islands Marina, Ltd.*, 918 F.2d 1476, 1479-80 (10th Cir. 1990), the Tenth Circuit held that, after dismissal of FSLIC in a case removed under 12 U.S.C. §1730(k)(1), the district court did not abuse its discretion in retaining the claims remaining after dismissal of FSLIC. As with *Myers*, there is no indication that the party opposing remand argued that the district court did not *have* discretion to remand the case. Likewise, this case provides no analysis supporting the assumption that the district court possessed discretion to remand.

Mizuna, Ltd. v Crossland Federal Savings Bank, 90 F.3d 650 (2nd Cir. 1996) also provides no useful analysis of the jurisdictional issues in question. *Mizuna* involved removal of an action by the FDIC under §1819(b)(2). 90 F.3d at 654-55. After the dismissal of the FDIC and the financial institution of which it had accepted conservatorship, the district court asserted jurisdiction and ruled on the merits. *Id.* The Second Circuit upheld the district court's assertion of jurisdiction over the claims remaining after dismissal of the FDIC and its ward bank. *Id.* at 657. The Second Circuit asserted axiomatically, without analysis, that the district court had supplemental jurisdiction after dismissal of the FDIC. *Id.* at 657. The court cited no authorities interpreting 12 U.S.C. §1819 in support of this conclusion. *Id.* *Mizuna* sheds little light on what kind of jurisdiction persists after dismissal of the FDIC. Indeed, as will be discussed *infra*, the bulk of the analysis in *Mizuna* deals with the court's determination that the district court's assertion of jurisdiction after dismissal of the FDIC did not exceed the constitutional boundaries of "arising under" jurisdiction under Art III of the Constitution.

Petitioners also cite an unpublished decision, *Diehl v. FDIC*, 1994 WL 68239, *2 (9th Cir. 1994) in support of their position.

(Continued on following page)

In *New Rock Asset Partners, L.P. v. Preferred Entity Advancements, Inc.*, the RTC filed a case in federal court pursuant to 12 U.S.C. §1441a(*l*)(1). 101 F.3d 1492, 1495 (3rd Cir. 1996). The RTC then sold its interests to a private third party and was dismissed from the case. *Id.* The Third Circuit determined that the district court did not have continuing jurisdiction over the claims remaining after dismissal of the RTC. *Id.* at 1499-1504. The court examined the wording of §1441a(*l*)(1), which stated that "any civil action, suit, or proceeding to which the [RTC] *is* a party shall be deemed to arise under the laws of the United States. . . ." *Id.* at 1499 (emphasis supplied). The court commented that the language of the statute did not clearly decide the issue of continuing jurisdiction, nor did the murky legislative history. *Id.* at 1499-1500. The court opined that the purpose of the statute was to resolve failed thrifts and to dispose of their assets. *Id.* at 1500-01. The court speculated that, by wording the statute to state that the district court would have original jurisdiction over cases in which the RTC "*is* a party," Congress intended that

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As an unpublished decision, it has no precedential value. *Id.* at *2, n.** Regardless, as with the previously discussed authorities, *Diehl* provides no reasoned explanation of the Ninth Circuit panel's assumption that the district court had only supplemental jurisdiction over the claims remaining after dismissal of the FDIC, nor does the *Diehl* court cite any authority interpreting 12 U.S.C. §1819(b)(2) in support of that assumption. *Diehl* is not helpful in deciding the question presented here.

jurisdiction would cease once the RTC was dismissed. *Id.* at 1501 (emphasis supplied).

New Rock cited scant authority for its determination the statute's present tense "is a party" phrasing indicated that jurisdiction under §1441a(*l*)(1) would evaporate upon dismissal of the RTC. The weakness of the *New Rock* rationale becomes clear when one considers how this Court has interpreted the similar present tense phrasing of the most widely used federal jurisdiction provision, the diversity jurisdiction statute. That statute provides the district courts with original jurisdiction of "all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and *is* between . . . citizens of different States[.]" 28 U.S.C. §1332(a) (emphasis supplied). Applying the reasoning of *New Rock* to the wording of the diversity statute would mean that a post-removal change in citizenship resulting in incomplete diversity would destroy diversity jurisdiction (i.e., at that point the controversy no longer "is" between citizens of different states). Yet, notwithstanding the diversity statute's use of the present-tense "is," this Court has consistently held that a post-removal change in citizenship of the parties in a diversity case will not divest the Court of original jurisdiction, *because jurisdiction is determined at the time of filing*. *See supra*. Surely Congress, in using the present tense "is a party" phrasing in §1819(b)(2), presumed that that the use of the word "is" would be interpreted by the federal courts in the same way it had been with the diversity statute, i.e.,

that jurisdiction would be determined at the time of removal and would not be divested by post-removal events. *See Cannon v. Univ. of Chicago*, 44 U.S. 677, 696-98 (1979) (when the court attempts to discern Congress' intent in drafting a statute, Congress is presumed to know how the federal courts previously interpreted similarly worded statutes). There is no reason to expect that Congress intended, by using present tense phrasing in §1819(b)(2), for district courts to reevaluate the jurisdictional footing at every stage of the proceedings.

Respondents respectfully submit that *New Rock* is the only Circuit decision outside the Fifth Circuit that thoroughly analyzed the jurisdictional issues *sub judice* and reached a result contrary to the Fifth Circuit. *New Rock* is inconsistent with this Court's settled precedents, which hold that the involvement of the FDIC gives a district court *original* subject matter jurisdiction over the entire case – jurisdiction which is not divested by a post-removal event such as dismissal of the FDIC.

III. UNDER *THERMTRON PRODUCTS, INC. V. HERMANSDORFER* AND *CARNEGIE-MELLON UNIV. V. COHILL*, A DISTRICT COURT DOES NOT HAVE DISCRETION TO REMAND CASES OVER WHICH IT HAS ORIGINAL JURISDICTION. THUS, THE FIFTH CIRCUIT CORRECTLY HELD THAT THE DISTRICT COURT DID NOT HAVE DISCRETION TO REMAND THIS ACTION.

Having determined that the FDIC's initial involvement provided continuing *original* subject matter jurisdiction over all the claims in this case under 12 U.S.C. §1819(b)(2), the Fifth Circuit below held that remand of any claim was inappropriate. (Pet. App. at 12a-13a.) In doing so, the Fifth Circuit relied on its decision in *Buchner*, which in turn relied on this Court's decision in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976).

In *Buchner*, the Fifth Circuit considered an appeal challenging a federal district court's order remanding a case to state court that had been removed under 12 U.S.C. §1819(b)(2). *Buchner*, following *Thermtron*, held that a district court has no discretion to remand cases over which it possesses original subject matter jurisdiction under 12 U.S.C. §1819. *See Buchner*, 981 F.2d at 820-21 (citing *Thermtron*, 423 U.S. at 345 (district court does not have discretion to remand a case on grounds not expressly permitted by the controlling statute)).

The Fifth Circuit noted in *Buchner* that there were only four sources of a district court's authority to

remand a case: 1) a district court has authority to remand all matters in which state law predominates under 28 U.S.C. §1441(c); 2) a district court must remand a case in response to a timely motion demonstrating a defect in removal procedure; 3) the district court must remand a case over which it has no subject matter jurisdiction; and 4) a district court may remand a case in which state law predominates. The court found that there was no applicable procedural defect and there was no lack of subject matter jurisdiction. *Id.* at 819-820. As to §1441(c), the court found, under 12 U.S.C. §1819:

> [I]f a case is removed from state court on the basis of federal question jurisdiction and that case also includes state law claims, §1441(c) allows the district court to decide the entire case or, in its discretion, to remand all matters in which state law predominates. As the FDIC is a party to the present suit, *all* of the component claims are *conclusively* deemed to have arisen under federal law. And, as §1441(c) authorizes the federal district court to remand only those matters in which state law predominates, *this discretionary remand provision is inapplicable to the instant action* . . . the Buchners' claims are treated as arising under federal law; therefore, the district court has *original subject matter jurisdiction* of this case under 28 U.S.C. §1331.

981 F.2d at 819 (emphasis supplied).

Buchner went on to hold that the district court had no discretion to remand under *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 347 (1988). The *Buchner* court noted that *Cohill* merely stands for the proposition that, when all federal question claims have been dismissed from a removed action, the district court has discretion to remand the remaining state law claims over which it had previously exercised only pendent jurisdiction (now codified as "supplemental" jurisdiction under 28 U.S.C. §1367). 981 F.2d at 820 (citing 484 U.S. at 357). Remand authority under *Cohill* was explicitly limited to cases involving pendent state law claims. 484 U.S. at 355, n. 11 ("The remand power that we recognize today derives from the doctrine of pendent jurisdiction and *applies only to cases involving pendent claims.*") (emphasis supplied). Because remand authority under *Cohill* was limited to pendent claims, that case did not provide authority to remand any claim over which the district court possessed *original* subject matter jurisdiction. 981 F.2d at 820. As the *Buchner* court had held that the district court had original subject matter jurisdiction over the *entire case*, including claims not involving the FDIC, the court held *Cohill* did not give the district court discretion to remand claims not involving the FDIC. *Id.*

Here, just as in *Buchner*, the district court's jurisdiction over the claims remaining after the dismissal of the FDIC was *original* subject matter jurisdiction under 12 U.S.C. §1819, *not supplemental* jurisdiction under 28 U.S.C. §1367. *See Brockman v. Merabank*,

40 F.3d 1013, 1015-17 (9th Cir. 1994) (where jurisdiction is "original" jurisdiction, rather than supplemental jurisdiction under 28 U.S.C. §1367(a), the district court has no discretion to remand under 28 U.S.C. §1367(c)); *Spring Garden Associates, L.P. v. RTC*, 26 F.3d 412, 415-17 (3rd Cir. 1994) (Presence of RTC as a party gave district court original subject matter jurisdiction over entire case, including claims not involving the RTC under 12 U.S.C. §1441a(*l*)(1); thus, appellate court did not need to address whether the district court had pendent jurisdiction over claims not involving FDIC. Moreover, because all claims in the action were deemed to arise under federal law under 12 U.S.C. §1819(b)(2), there were no separate and independent "state law claims" left to predominate, thus, remand was not permitted under 28 U.S.C. §1441(c).).

Having determined that the FDIC's initial involvement gave the district court *original* subject matter jurisdiction over the entire case, and that jurisdiction is determined at the time of removal and may not be divested by subsequent events such as the dismissal of the FDIC, the Fifth Circuit's ultimate conclusion necessarily followed. Under *Thermtron* and *Cohill*, a district court may not remand cases over which it possesses original subject matter jurisdiction.[5]

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[5] It is worthy of note that, although a district court has no discretion to remand a case after intervention and removal of

(Continued on following page)

IV. PETITIONER'S ARGUMENT THAT THE FIFTH CIRCUIT'S INTERPRETATION OF 12 U.S.C. §1819 STRETCHES BEYOND THE JURISDICTION PROVIDED BY ART. III MAY NOT BE RAISED FOR THE FIRST TIME IN THEIR PETITION. REGARDLESS, THE FIFTH CIRCUIT'S INTERPRETATION OF THE STATUTE DOES NOT EXCEED CONSTITUTIONAL LIMITS.

Where issues were not considered by a United States Court of Appeals, the United States Supreme Court will not ordinarily consider them. *Meyer v. Holley*, 537 U.S. 280, 291 (2003). Here, despite having briefed the appeal issues fully before the Fifth Circuit, and despite having filed petitions for both panel rehearing and rehearing *en banc*, the Petitioners have not asserted a constitutional issue until filing their petition for writ of certiorari. For this reason alone, this Court should disregard this argument advanced by the Petitioners.

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the FDIC, this does not mean that the district courts will be charged with the jurisdiction of every case that ever involves the FDIC. Congress specifically provided for considerations of comity to the state courts in drafting 12 U.S.C. §1819(b)(2)(D), which provides that state law actions meeting certain criteria will not be deemed to arise under the law of the United States. It is undisputed that this "state law exception" does not apply here, because the FDIC was appointed by a federal authority, the Office of Thrift Supervision. To find a discretion in the district courts to remand claims not embraced by this state law exception would upset the balance between federal and state jurisdictions established by Congress in the statute.

In any event, the Fifth Circuit's interpretation of 12 U.S.C. §1819 is well within Art. III "arising under" jurisdiction.

First, the presence of the FDIC as a party when this action was removed is sufficient to confer jurisdiction under Art. III. As this Court noted in *American National Red Cross*, "As long ago as *Osborn* [*v. United States*], this Court held that Article III's 'arising under' jurisdiction is broad enough to authorize Congress to confer federal-court jurisdiction over actions involving federally chartered corporations." 505 U.S. at 264-65 (citing *Osborn*, 9 Wheat. 738, 823-28, 6 L.Ed. 204 (1824)); *see also* the *Pacific Railroad Removal Cases*, 115 U.S. 1 (1885) (relying on *Osborn* to hold that every case, irrespective of its nature, brought by or against a federally chartered corporation is a suit arising under the laws of the United States). As the Fifth Circuit held in *In re Meyerland Co.*:

> Even if the only issues to be decided are ones of state law, Article III permits the exercise of jurisdiction if one of the parties is a federal corporation . . . Congress enacted 12 U.S.C. §1819 precisely so that the FDIC could enjoy federal question jurisdiction similar to that articulated in *Osborn* and the *Pacific Railroad Removal Cases*.

960 F.2d 512, 518-19 (1992).

Even if Art. III jurisdiction cannot be grounded under the rule laid down in *Osborn*, the FDIC's initial

involvement would, nevertheless, confer Art. III jurisdiction, because 12 U.S.C. §1819 is part of a

> comprehensive scheme comprising both pure jurisdictional provisions *and* federal law capable of supporting Art. III arising under jurisdiction . . . Although the particular case brought by [plaintiff] does not implicate principles of conservatorship or receivership under state or federal law, and raises no federal issue of any kind, we are satisfied that this particular jurisdictional grant is part of a comprehensive scheme enacted by Congress to serve and promote incontestibly federal goals on a comprehensive basis . . . the jurisdictional grant in §1819(b)(2)(A-B) falls within the ambit of cases where the whole purpose of the congressional legislative program requires the availability of federal jurisdiction.

Mizuna, 90 F.3d at 655-56 (concluding that district court had power to hear case under Art. III, despite absence of any federal law issue in the complaint or the answers) (citing *Mesa v. California*, 489 U.S. 121, 139 (1989) (internal quotations and citations omitted).

Lastly, even if *Osborn v. Haley*, 549 U.S. 225 (2007) has application to the Art. III issue in this case as Petitioners argue, the exercise of jurisdiction here would not exceed Art. III limits under the rule stated in that case. *Haley* held that where a significant federal question is raised *at the outset of a case*, the case "arises under" federal law as that term is used in

Art. III, even if only state law claims remain after resolution of the initial federal question. 549 U.S. at 244-45. In this case, multiple significant federal questions were raised at the time of removal. The FDIC raised federal defenses in its Amended Notice of Removal, stating that "12 U.S.C. Sections 1823(e), 1831d(a) and/or 12 U.S.C. Sections 85 and 86 and related statutes make alleged agreements enforceable only if in writing and preempt state law usury claims." (Resp. App. at 15a-17a.) Moreover, Petitioners' motion to dismiss the FDIC was based squarely on an issue of federal law:

> According to information published by the FDIC, the assets of NetBank are not sufficient to cover the uninsured deposits of the depositors of NetBank. *According to federal law*, the claims of NetBank depositors have priority over the claims of the Plaintiffs. Since as a practical matter there is no real possibility that Plaintiffs will be able to collect on any judgment they might obtain against FDIC, Plaintiffs desire to dismiss FDIC, as Receiver for NetBank[.]

(Resp. App. at 6a.) (emphasis supplied) (the priority provision of federal law which the Petitioners referred to in their motion to dismiss the FDIC is 12 U.S.C. §1821(d)(11), the National Depository Preference Act). Because multiple significant issues of federal law were raised "at the outset," the exercise of jurisdiction by the district court as directed by the Fifth Circuit

would not exceed Art. III limitations under the rule stated in *Haley*.

CONCLUSION

As set forth herein, the question presented is answered by the settled precedents of this Court. The petition for writ of certiorari does not warrant this Court's attention, and should be denied.

Respectfully submitted,

ROY H. LIDDELL (MSB #1252)
TREY C. DELLINGER (MSB #10348)
WELLS MARBLE & HURST, PLLC
300 Concourse Blvd., Suite 200
Ridgeland, Mississippi 39157
Post Office Box 131
Jackson, Mississippi 39205-0131
Telephone (601) 605-6900

Attorneys for Respondents
Lease Partners, Inc. and
First Bank Richmond, N.A.

Dated: April 19, 2010.

APPENDIX A

OFFICE OF THRIFT SUPERVISION

Receivership Of A Federal Savings Association

Date: September 27, 2007
Order No.: 2007-43
OTS No.: 8475

The Director of the Office of Thrift Supervision (OTS), or his designee, in cooperation with the Federal Deposit Insurance Corporation (FDIC), has determined to appoint the FDIC as receiver of NetBank, Alpharetta, Georgia (Savings Bank).

GROUNDS FOR APPOINTMENT OF FDIC AS RECEIVER FOR THE SAVINGS BANK

The Director, or his designee, has considered a September 27, 2007, memorandum and attachments, a resolution by the Savings Bank's board of directors consenting to the appointment of a conservator or receiver, Thrift Financial Reports filed by the Savings Bank from 2005 through 2007, and other information and finds and determines the following:

(i) The Savings Bank is in an unsafe and unsound condition to transact business;

(ii) The Savings Bank has incurred losses that have depleted substantially all of its equity capital, and there is no reasonable prospect for the Savings Bank to become adequately capitalized without Federal assistance;

(iii) The Savings Bank has consented to the appointment of a conservator or receiver;

(iv) The Savings Bank is undercapitalized as defined in section 38(b) of the Federal Deposit Insurance Act (FDIA) and has no reasonable prospect of becoming adequately capitalized, and has failed to submit an acceptable capital restoration plan within the time prescribed by 12 C.F.R. § 565.5(a); and

(v) The Savings Bank has substantially insufficient capital.

The Savings Bank is a Federally chartered savings bank, the accounts of which are insured by the Deposit Insurance Fund (DIF). The Savings Bank has its home office in Alpharetta, Georgia. As of June 30, 2007, the Savings Bank reported total assets of $2.474 billion.

DISCUSSION OF GROUNDS FOR APPOINTMENT OF A RECEIVER FOR THE SAVINGS BANK

Section 5(d)(2)(A) of the Home Owners' Loan Act (HOLA), 12 U.S.C. § 1464(d)(2)(A), provides that the Director may appoint a receiver for any insured savings association if the Director determines that one or more grounds specified in section 11(c)(5) of the FDIA, 12 U.S.C. § 1821(c)(5), exist.

Under section 11(c)(5)(C) of the FDIA, the Director may appoint a receiver if a savings association is in

an unsafe and unsound condition to transact business. The Director finds that the Savings Bank is in an unsafe and unsound condition due to its capital deficiency, lack of core profitability, extreme vulnerability to market risk, and very poor asset quality. Over the past two years the Savings Bank has experienced significant losses due in part to required provisions for the allowance for loan losses, asset valuation adjustments and write-downs, and operating losses. These losses have significantly depleted capital resulting in the Savings Bank being significantly undercapitalized. Further, certain of the Savings Bank's mortgage and loan servicing portfolios have declined significantly in value and have resulted in write-downs. Such write-downs have substantially depleted capital. Additional declinations in asset values are likely, thereby, further depleting capital and jeopardizing the Savings Bank's operations.

In addition, the Savings Bank lacks core profitability and it's operations are extremely vulnerable to market risk due to significantly decreased demand for sub-prime mortgages and the Savings Bank has experienced a flattening yield curve and interest rate compression. The narrowing interest rate spread, when combined with the relatively higher general and administrative expenses of the Savings Bank, has resulted in losses on core operations during the past two years. The Savings Bank has been unable to reverse these trends. Moreover, the Savings Bank has ceased to operate some businesses and would have significant difficulty reviving those operations. The

Savings Bank's earning capacity is insufficient to replenish capital to the required regulatory levels in the foreseeable future. Therefore, the Director concludes that the Savings Bank is in an unsafe and unsound condition.

Under section 11(c)(5)(G) of the FDIA, the Director may appoint a receiver if a savings association has incurred, or is likely to incur, losses that have or will deplete all or substantially all of its capital, and there is no reasonable prospect for it to become adequately capitalized, as defined in section 12 U.S.C. § 1831c(b), without Federal assistance. The Savings Bank already has incurred losses that have depleted substantially all of its capital. As a result of the losses already suffered, the Savings Bank currently has insufficient capital. The Director has determined that (i) the Savings Bank will likely continue to suffer additional losses, in part because its assets are likely to continue to decline in value, it has a high level of general and administrative expenses, and it is experiencing narrowing interest rate spreads; (ii) the Savings Bank's holding company does not have, and has been unable to access, the funds necessary to recapitalize the Savings Bank; (iii) a proposed transaction to sell the Savings Bank has failed to materialize and no other potential acquirers presently exist; and (iv) the Savings Bank has withdrawn its plan to restore its capital. Therefore, the Director concludes that it is unlikely that any reasonable proposal to recapitalize the Savings Bank will be forthcoming from the Savings Bank, its holding

company or a third party. Therefore, the Director concludes that the Savings Bank has incurred losses that depleted substantially all of its capital and is likely to incur further losses, and there is no reasonable prospect for it to become adequately capitalized, as defined in section 12 U.S.C. § 1831c(b), without Federal Assistance.

The Director finds that the board of directors of the Savings Bank by resolution dated September 26, 2007, consented to the appointment of a conservator or receiver by the Director and the Savings Bank entered into a consent agreement with OTS for such an appointment. Under Section 11(c)(5)(I) of the FDIA, that resolution by the board of directors provides a sufficient grounds [sic] for the appointment of a receiver.

Under section 11(c)(5)(K) of the FDIA, the Director may appoint a receiver if a savings association is undercapitalized as defined in 12 U.S.C. § 1831c(b) and has no reasonable prospect of becoming adequately capitalized or fails to submit a capital restoration plan under 12 U.S.C. § 1831c(e)(2). Under section 1831c(b) an institution is undercapitalized if it fails to meet any required minimum capital level. OTS has determined that an institution is significantly undercapitalized if it has a leverage ratio that is less than three percent or a total risk-based capital ratio that is less than six percent. The Savings Bank has a leverage (core) capital ratio of 2.55 percent and a total risk-based capital ratio of 4.42 percent.

As discussed above, there is no reasonable prospect of the Savings Bank becoming adequately capitalized without Federal Assistance. Therefore, the Director concludes that the Savings Bank is undercapitalized and that it has no reasonable prospect of becoming adequately capitalized. In addition, the Savings Bank has withdrawn the capital restoration plan it had submitted to OTS effectively negating that submission. Therefore, the Director also concludes that the Savings Bank has failed to submit a capital restoration plan within the time prescribed in 12 C.F.R. § 565.5(a).

Under section 11(c)(5)(L)(ii) of the FDIA, the Director may appoint a receiver if a savings association has substantially insufficient capital. Pursuant to the authority granted in sections 5(t)(1)(A)(i) and 5(f)(2)(A) of the HOLA, the Director has promalgated 12 C.F.R. § 567.8(b) requiring all savings associations that are not "one" rated to maintain a leverage capital ratio of 4 percent. The Director concludes that failure to maintain at least two thirds of the leverage capital required by section 567.8(b) of OTS's regulations constitutes a substantial capital insufficiency within the meaning of the FDIA. The Savings Bank is not "one" rated and has a leverage capital ratio of only 2.55 percent. Therefore, the Director concludes that the Savings Bank has substantially insufficient capital. In addition, section 5(t)(2)(C) of the HOLA provides that OTS must require each savings association to maintain risk-based capital. OTS has prescribed that the minimum risk-based capital

amount must be 8 percent of the Institution's risk-based assets, as defined. The Director has concluded that failure to maintain at least two thirds of the risk-based capital required by section 567.2(a)(1) of OTS's regulations constitutes a substantial capital insufficiency within the meaning of the FDIA. The Savings Bank's risk-based capital is 4.42 percent. Thus, the Director concludes that the Savings Bank has substantially insufficient capital.

The Director, or his designee, therefore, has determined that grounds for the appointment for a receiver for the Savings Bank exist under section 5(d)(2) of the HOLA, and sections 11(c)(5)(C), (G), (I), (K) and (L) (ii) of the FDIA, 12 U.S.C. §§ 1821(c)(5)(C), (G), (I), (K) and (L)(ii).

ACTIONS ORDERED OR APPROVED

Appointment of a Receiver

The Director, or his designee, hereby appoints the FDIC as receiver for the Savings Bank, for the purpose of liquidation, pursuant to section 5(d)(2) of the HOLA, and section 11(c)(6)(B) of the FDIA.

Delegation of Authority to Act for OTS

The Director, or his designee, hereby authorizes the OTS Southeast Regional Director, or his designee, and/or the Deputy Chief Counsel for Business Transactions, or his designee, to: (i) certify orders; (ii) sign, execute, attest, or certify other documents of

OTS issued or authorized by this Order; (iii) deliver or accept delivery of any notice from or to OTS regarding the Savings Bank; and (iv) perform such other functions of OTS necessary or appropriate for the implementation of such Order. All documents to be issued under the authority of this Order must be first approved, in form and content, by the Chief Counsel's Office. In addition, the director, or his designee, hereby authorizes the Deputy Chief Counsel for Business Transactions, or his designee, to make any subsequent technical corrections, that might be necessary, to this Order, or any documents issued under the authority of this Order.

By Order of the Director of OTS, effective when a copy of this Order is delivered to the Savings Bank.

s/ Scott M. Polakoff
Scott M. Polakoff
Senior Deputy Director and
Chief Operating Officer

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
MISSISSIPPI JACKSON DIVISION

GLENN ALLEN ADAIR d/b/a
SUPER D #229, et al.

PLAINTIFFS

v.

CIVIL ACTION Nos.
3:07CV608TSL-JCS

AMERUS LEASING, INC., et al.

DEFENDANTS

MOTION TO DISMISS FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR NETBANK

Come now all Plaintiffs and move the Court to dismiss the Federal Deposit Insurance Corporation ("FDIC"), as Receiver for NetBank who was the successor to Republic Leasing, Inc., from this action. Plaintiffs would show the Court as follows:

1. Plaintiffs commenced this action in February 1996 in the Circuit Court of Hinds County, Mississippi. Republic Leasing Company, Inc. ("Republic") was one of the defendants named in the original complaint. Since that time, Republic was purchased by, and became a division of, NetBank. In September 2007, FDIC was appointed as Receiver of NetBank. FDIC then removed this entire action to this Court

pursuant to 12 USC §1819 (b)(2)(A) and 28 USC §1331.

2. According to information published by the FDIC, the assets of NetBank are not sufficient to cover the uninsured deposits of the depositors of NetBank. According to federal law, the claims of NetBank depositors have priority over the claims of the Plaintiffs. Since as a practical matter there is no real possibility that Plaintiffs will be able to collect on any judgment they might obtain against FDIC, Plaintiffs desire to dismiss FDIC, as Receiver for NetBank, from this action pursuant to Fed. R. Civ. P. 41(a)(2).

WHEREFORE, PREMISES CONSIDERED, Plaintiffs pray that the Court will enter an order dismissing all claims asserted against FDIC, as receiver for NetBank, in this action pursuant to Fed. R. Civ. P. 41(a)(2).

Respectfully submitted,

By: s/ Paul N. Davis
Paul N. Davis (MSB # 8638)
ATTORNEYS FOR PLAINTIFFS

OF COUNSEL:

BUTLER, SNOW, O'MARA,
STEVENS & CANNADA, PLLC
17th Floor, AmSouth Plaza
Post Office Box 22567
Jackson, Mississippi 39225-2567
(P)(601) 948-5711
(f)(601) 949-4555

CERTIFICATE OF SERVICE

I, Paul N. Davis, one of the attorneys for Plaintiffs, do hereby certify that I have this day filed the foregoing with the Clerk of the Court using the Court's ECF system which sent notification of such filing to all registered ECF participants. I further certify that I have this day served a true and correct copy of the above and foregoing instrument by United States Mail, postage fully prepaid, to the following:

C. Max Tullos, Jr.
P. O. Box 12865
Jackson, Mississippi 39236

Alex Bidez
3810 Tara Dr,
Destrehan, LA 70047-5047

Vincent T. Borst, Esq.
Askounis & Borst, P.C.
303 East Wacker Drive,
Suite 1000
Chicago, IL 60601
Phone: (312) 861-7100
Fax: (312) 861-0022
Attorney for Lease Partners Corp.; Lease Partners Finance Corp.

Buel H. Humphreys
585 Woodvine Ave,
Metairie, LA 70005-4443

Thomas M. Kidd
509 Hinsdale Dr.
Arlington, TX 76006-2013

Ronald K. Larue
324 Gibson Court
Cappell, Texas 75019

Barry Longwater
Agent for Service
2796 Lombardy
Memphis, Tennessee 38111
Attorney for Longwater Funding Resources, Inc.

SO CERTIFIED, this the 11th day of January, 2008.

s/ Paul N. Davis
PAUL N. DAVIS

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF
MISSISSIPPI JACKSON DIVISION

GLENN ALLEN ADAIR DBA SUPER D 229; VICKIE S. ELLINGTON D/B/A ATTALA DISCOUNT DRUGS; RAWLS DRUG CO., INC.; JOE RAY BOURN D/B/A THE DRUG STORE; DELTA PHARMACY INC. D/B/A LEE PHARMACY; WAYNESBORO ANIMAL CLINIC, INC.; SERVICE REXALL DRUGS, INC.; DALLAS LITTLE, JR., D/B/A LITTLE'S PHARMACY; SOUTHERN DISCOUNT DRUGS OF CHARLESTON, D/B/A SOUTHERN DISCOUNT DRUGS/ROBERT L. SALMON; MAY'S PHARMACY D/B/A COLDWATER PHARMACY /JAMES A. MAY; ANIMAL MEDICAL CENTER OF ELLISVILLE, INC./KIMBERLY A. MARTIN; BAKER'S PHARMACY, INC./ED L. BAKER; BEACH PHARMACY, INC.; JOHN T. HALL, D/B/A MCDUFFIE DRUG CO.; HENDERSON DRUG, INC.; CHARLES BOGGAN, DECATUR DRUGS, INC DBA

CASE NO.
3:07cv608DPJ-JCS

WHEELER DRUG STORE; BILLIE JAMES BONNER DBA BONNER PHARMACY; RANDY CALVERT; BRENT'S DRUGS INC.; DWIGHT G. CARR DBA CARR'S DISCOUNT DRUGS; KENNY G. COLEMAN DBA COLEMAN'S HEALTH MART PHARMACY; MICHAEL E. DURAN; NANA'S INC.; JAMES E. GABLE; SOUTHERN DRUG STORE, INC. DBA SOUTHERN DRUG; RICHARD HUNT; MR. DISCOUNT DRUGS OF FOREST, INC.; JAMES J. JELKS, JR. DBA CENTREVILLE DRUGS; DONALD G. KITCHENS; WILSON DRUG COMPANY OF CORINTH, INC. FORMERLY DBA KITCHENS DRUG CO.; TIMOTHY L. LIDDY DBA SUPER D DRUGS #216; ROBERT L. MAYS DBA RIPLEY DRUG COMPANY; SUPER SAV-ON DRUGS OF AMERICA, INC.; WILLIAM BELL/CITY DRUG STORE; JIM BAIN/JIM BAIN'S PHARMACY; CHARLES BEST; ANN DEVOE/GATHRIGHT-REED DRUG COMPANY, INC.; JAMES A. MAY/MAY'S PHARMACY, INC.; LARRY

MELTON; SUPER SAVE ON
DRUGS OF AMERICA, INC.

PLAINTIFFS

vs.

FEDERAL DEPOSIT
INSURANCE CORPORATION,
AS RECEIVER FOR
NETBANK; REGIONS BANK,
AS SUCCESSOR TO
WHITEVILLE BANK, FIRST
COMMERCIAL BANK OF
MEMPHIS (F/K/A UNITED
AMERICAN BANK) AND
ST. JAMES BANK AND
TRUST; LEASE PARTNERS,
INC.; FIRST BANK RICHMOND;
BANCORPSOUTH BANK;
ALEX BIDEZ; BUEL H.
HUMPHREYS; THOMAS M.
KIDD; RONALD K. LARUE;
LONGWATER FUNDING
RESOURCES, INC.; AND
C. MAX TULLOS, JR.

DEFENDANTS

AMENDED NOTICE OF REMOVAL

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for NetBank, files this Amended Notice of Removal – *amending to list the remaining plaintiffs and defendants (and only those parties) and to correctly list exhibits* – pursuant to *12 U.S.C. Sections 1819(b)(2)(B) and 1823(e) and 12 U.S.C.*

Sections 85 and 86 and 1831d(a) and respectfully shows the Court the following:

1. The Federal Deposit Insurance Corporation ("FDIC") is a corporation duly authorized and organized under the laws of the United States of America [*12 U.S.C. Section 1811, et seq.*].

2. On September 14, 1998, a First Amended Complaint in the action captioned *Glenn Allen Adair, et al. v. Amerus Leasing, Inc., et al.*, was filed in the MDL proceedings in the United States District Court, Middle District of Florida, Tampa Division. This action was pending in the Circuit Court of the First Judicial District of Hinds County, Mississippi ("Circuit Court"), Civil Action No. 252-96-147. A copy of the First Amended Complaint was attached to the Notice of Removal (though not referenced therein) as Exhibit A and is incorporated herein. The caption in this Amended Notice lists only the plaintiffs and defendants who remained as parties, to the FDIC's knowledge, at the time of removal.

3. On September 27, 2007, the Office of Thrift Supervision appointed the FDIC as Receiver of NetBank.

4. On September 28, 2007, the FDIC accepted the appointment and took control of NetBank, as Receiver. (True and correct copies of the Appointment documents are referenced in the original Notice as Exhibit A and are attached hereto as Exhibit A-1.)

5. By orders of October 8, 2007, the Circuit Court entered orders substituting the FDIC as a real party (defendant) in interest in this case (see

Exhibit B to the original Notice, incorporated herein) and staying the case for 90 days.

6. Pursuant to *12 U.S.C. Section 1819(b)(2)(A)*, all suits of a civil nature to which the FDIC, in any capacity, is a party are deemed to arise under the laws of the United States and the district courts have original jurisdiction thereof as provided under *28 U.S.C. Section 1331. 12 U.S.C. Sections 1823(e), 1831d(a)* and/or *12 U.S.C. Sections 85 and 86* and related statutes make alleged agreements enforceable only if in writing and preempt state law usury claims.

7. The Circuit Court of Hinds County, Mississippi is situated within this district and division, making venue in this Court proper under 28 U.S.C. Section 1441 (a).

8. A copy of the Notice of Removal was filed with this court on October 12 (On page 2 it incorrectly bore the date of October 10.) and was filed with the state court clerk and served upon all counsel of record that day. This Amended Notice of Removal is being served upon all counsel of record.

Dated: October 15, 2007.

Respectfully submitted,

FEDERAL DEPOSIT
INSURANCE CORPORATION

s/ Julianne Farnsworth

By: David W. Clark
One of its Attorneys

David W. Clark
(MBN 6112)
BRADLEY ARRANT
ROSE & WHITE LLP
188 E. Capitol St., Ste. 450
P.O. Box 1789
Jackson, MS 39201
Phone: (601) 948-8000

Julianne Farnsworth
(admitted *pro hac vice*)
FARNSWORTH LAW
FIRM LLC
Post Office Box 338
Charleston, SC 29402
Phone: (843) 723-0425

CERTIFICATE OF SERVICE

The undersigned, counsel for certain defendants, certify that I have this day mailed by United States Mail, postage prepaid, to all counsel of record a true and correct copy of the foregoing to the following addresses:

Mr. Paul N. Davis
Ms. Erin P. Lane
Butler Snow O'Mara
Stevens & Cannada,
PLLC
17th Floor
AmSouth Plaza
P.O. Box 22567
Jackson, MS 39225-2567
Plaintiffs

Roy H. Liddell, Esq.
Trey Dellinger, Esq.
Wells Marble & Hurst,
PLLC
300 Concourse Blvd.,
Suite 200
Ridgeland, MS 39157

Julianne Farnsworth, Esq.
Farnsworth Law Firm LLC
Post Office Box 338
Charleston, S.C. 29402
Federal Deposit
Insurance Corporation
David W. Clark, Esq.
Bradley Arant Rose &
White, LLP
188 E. Capitol St.,
Ste. 450
Jackson, MS 39201
Phone: (601) 948-8000
Regions Bank (and local
counsel for **FDIC**)

J. Patrick Caldwell, Esq.
Kevin Smith, Esq.

P.O. Box 131
Jackson, MS 39205-0131
Phone: (601) 355-8321
Fax: (601) 355-4217
Lease Partners, Inc., Lease Partners Acquisitions Corporation, et al.

Riley Ford Caldwell & Cork
207 Court Street
P.O. Box 1836
Tupelo, MS 38802
Phone: (662) 842-8945
Fax: (662) 842-9032
BancorpSouth Bank

DATE: October 15, 2007

s/ Julianne Farnsworth by David W. Clark
JULIANNE FARNSWORTH
By: David W. Clark